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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 139

FRANKLIN PERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 53–58) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 29, 1943 (R. 58–59). The petition for a writ of certiorari was filed July 2, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rules XI and XIII of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether a fatal variance between the indictment and proof resulted from the fact that the Government's proof established the nonfraudulent character of one of the several fraudulent representations petitioner was charged with making in execution of a scheme to defraud.

2. Whether the evidence is sufficient to sustain petitioner's conviction of mail fraud.

STATUTE INVOLVED

The mail-fraud statute (Section 215 of the Criminal Code, 18 U. S. C. 338) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom,

> whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioner was charged in a 5-count indictment returned in the District Court for the District of New Mexico with causing the use of the mails in execution of a scheme to defraud, in violation of the mail fraud statute (*supra*) (R. 1–11). The scheme to defraud alleged in each count was one consisting of the making of various false and fraudulent representations and promises to induce named persons, and the public generally, to give, send, and pay money and property to petitioner for the purchase, recording, and delivery of assignments of oil leases on land located in the State of New Mexico (see R. 1–5, 8). Each count alleged that petitioner caused the mailing of a different writing in execution of the scheme to defraud (see R. 5–8, 8–11).

At the conclusion of the Government's case petitioner made a motion for a directed verdict on all counts, which was granted as to counts 1, 2, and 3 but denied as to counts 4 and 5 (R. 43;

see also R. 16). The jury found petitioner guilty on both of the latter counts (R. 12) and the court sentenced him to serve 8 months' imprisonment under each count, the sentences to run concurrently (R. 12–13).[1] The circuit court of appeals affirmed the conviction (R. 53–59).

The Government's case may be summarized as follows:

In March 1938 petitioner obtained from the Land Office of the State of New Mexico an oil lease on approximately 2,000 acres of unrestricted land in the State at a total cost of $131.47, including fees for services in connection with the procurement of the lease, the charge by the State being 5 cents an acre (R. 16–17, 40). In August 1938 he sold the lease on 160.24 acres of the land, in sections of approximately 40 acres each, to William J. Dietrich of Allentown, Pennsylvania, for $200 (R. 8–11, 32, 33, 35, 46) and in September 1938 sold the lease on 200.08 acres, also in tracts of approximately 40 acres each, to Mabel and Albert Willauer, Quakerstown, Pennsylvania, for $500 (R. 5–8, 20–21, 25, 44–45).

Petitioner effected the sale to the Willauers at a price of $2.50 an acre, as compared with the 5 cents an acre charged by the State, through representations made during repeated visits at the

[1] Apparently, the motion for a directed verdict as to counts 4 and 5 was not renewed at the close of all the evidence (see R. 43) and no motion for a new trial was filed.

Willauer home for the purpose of selling a part of his 2,000-acre oil lease. On his first visit, Mrs. Willauer told him she would have nothing to do with oil stock—that her father had invested and lost. Petitioner told her that "this oil stock was quite different." He showed Mr. and Mrs. Willauer a map of the State of New Mexico on which his various 40-acre sections were marked and picked out one section which appeared to be near two producing wells. Mr. and Mrs. Willauer were reluctant to buy, however. (R. 19–20.) Petitioner visited them again and this time said he wanted to make them rich, that they could not "lose any money in these things," that the leases were good, that there were producing wells nearby, that a big company owned the surrounding land and had already started drilling in some places, that if the company found oil they would offer the Willauers a big price for their lease, and that they, the Willauers, could not fail to make money by buying a lease (R. 19, 25, 28, 29, 30). Mrs. Willauer thought the producing wells were "maybe fifty or one hundred feet away" (R. 19). Finally, after several visits to the Willauers, petitioner "made it so strong" that Mrs. Willauer suggested to her husband that they invest $100 (R. 19–20). Petitioner "didn't want to hear about One Hundred Dollars" and continued to tell them "how we were going to make money out of this thing" (R. 20). Finally, he got them to go into partner-

ship with him on four sections, at a cost of $200 to the Willauers. Petitioner sent the lease to the Land Office in New Mexico for assignment, but it was returned, unrecorded, because it had three names on it. (R. 20.) He then persuaded the Willauers to put $200 more in the oil lease and, finally, an additional $100, making a total of $500 (R. 20, 25). Mr. Willauer signed a purchase contract which, among other things, contained the statement, "I thoroughly understand that this purchase is speculative" (R. 46–47), but he did not read the contract before signing it (R. 24, 27).

The Willauers have never received anything from the five 40-acre sections which they purchased from petitioner (R. 29). None of the sections [designated in Plaintiff's Exhibit No. 4 (R. 45), which partially is set forth at R. 5–8] were near producing oil wells. The first section was 10 miles from a hole abandoned in 1932, and in March 1938 the nearest producing oil well was about 90 miles south, in the Comanche field in Chavez County; the second section was 5 miles from a dry hole and in 1938 was about 180 miles from the nearest producing well; the third is 2 miles from a drying well abandoned in 1933 and in 1938 was 60 miles from the closest producing well; the fourth "is extremely wild-cat area," is 20 miles from an abandoned hole, and in 1938 was 90 miles from the nearest producing well; and the fifth section is 10 miles from a dry hole, completed in 1929, and in 1938 was 54 miles from a producing well.

(R. 6, 36–37.) "The fact that the hole was dry ten miles away would be indicative and would make the area very unattractive and point to it as being unlikely oil territory" (R. 40).

The sale to William Dietrich of 160.24 acres was made by similar misrepresentations. Petitioner told Dietrich that he had purchased around 1,900 or 2,000 acres in New Mexico, "that it was in a hot spot," that "we are going to make a lot of money out of it, the profits out of these leases, very enormous," that "it was good territory, very excellent territory," and that "some of the territory he had was on production he said on structure" (R. 32–34). Petitioner showed Dietrich a map and said he would let him "in on a certain location where there had been a well drilled some years ago and the company through financial difficulties never finished the well * * * the well might be producing anywhere from four months to a year, not over a year at the outside" (R. 32), and that he was going to form "a good strong company that would give us production" by selling "a lot of this valuable gas," giving the purchasers shares in the company, and combining the 2,000-acre oil lease with "productive land in Texas" which he owned and with well-located land in New Mexico which he intended to purchase (R. 33). He told Mr. Dietrich that he wished the latter to be a director in the company (R. 33, 35). Mr. Dietrich had successfully invested in oil stock previously

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but, since petitioner appeared well-informed regarding oil properties, he had "a great deal of confidence in" petitioner's "intelligence and his knowledge of oil and in his sincerity at that time" (R. 32, 35) and believed petitioner's story about the formation of a company until after petitioner "had gone from our community and never returned" (R. 33). Dietrich told petitioner, however, that his price of $100 for a 40-acre section was too high (R. 32). Petitioner then reduced the price to $50 a section (R. 32) and Dietrich paid him $200 for four 40-acre tracts (R. 35).

Like the Willauers' acreage, none of Dietrich's acreage was near a producing well. In March 1938 the first 40-acre section [designated in Plaintiff's Exhibit No. 5 (R. 46), which is set forth at R. 8–11] was 96 miles from the nearest production; the second section "is just north" of a dry hole and was 140 miles northeast of the closest production; the third section is about 9 miles from a dry hole drilled in 1933 and was approximately 60 miles north of the closest production; the fourth section "is extremely wild cat territory," and is 20 miles from a well which was completed in 1929 and abandoned (R. 9, 37–38).

No drilling has ever taken place on the Willauer or Dietrich tracts (R. 36–38).

Count 4 of the indictment alleged that petitioner caused the mailing of an oil lease assignment, together with instructions and information, by the

Commissioner of Public Lands at Santa Fe, New Mexico, to the Willauers on September 30, 1938 (R. 5–8). Mr. Willauer testified that the lease assignment [which was introduced in evidence as a part of Gov't Ex. No. 4 (R. 45) and is set forth at R. 5–7] was sent "out" by petitioner (R. 25), and Mrs. Willauer added that petitioner told them they would receive their lease through the mail (R. 24). Both Mr. and Mrs. Willauer testified that they did in fact receive the lease assignment and accompanying material through the mail (R. 20, 24, 25–26) and the envelope in which the Willauers received the lease, introduced in evidence as part of Gov't Ex. No. 4, showed that the lease assignment had been mailed on September 30, 1938, at Santa Fe, New Mexico, by the Commissioner of Public Lands, Santa Fe, New Mexico (R. 20–21, 44). The letter of transmittal and a receipt which accompanied the lease assignment when the Willauers received it revealed that the lease had been mailed to the land commissioner for "transfer and registration," accompanied by a $5 filing fee (R. 44, 45).

Count 5 of the indictment alleged that petitioner caused the mailing of a similar oil lease assignment, together with a letter of transmittal to Mr. Dietrich on August 11, 1938, at Santa Fe, New Mexico, by the Commissioner of Public Lands, State of New Mexico (R. 8–11). Mr. Dietrich testified that he and petitioner mailed the

lease to the Land Commissioner at Santa Fe in a letter box and that the lease and letter of transmittal from the land commissioner, as set out in count 5 (see R. 8–11, 33, 46) came back to him by mail (R. 33). The letter of transmittal from the Commissioner of Public Lands showed that the lease had been mailed to the land commissioner for filing, accompanied by a $5 filing fee (R. 8–9, 46).

ARGUMENT

I

Petitioner contends that there was a fatal variance between the indictment and proof, because the indictment charged that he purchased his 2,000-acre lease from a lease broker and represented to victims that he purchased it direct from the State of New Mexico, whereas the proof showed that he purchased the lease from the State and consequently did not misrepresent its source (Pet. 8–10). Although this variance did in fact exist, it furnishes no ground for further review of the case by this Court.

Petitioner's argument that the variance was fatal assumes that every variance between an indictment and the proof offered in support thereof is fatal (Pet. 10). The contrary is well established. As this Court has stated, "The true inquiry * * * is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of

the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." *Berger* v. *United States*, 295 U. S. 78, 82.

There was certainly no violation of the above requirements in the instant case. As petitioner admits (Pet. 10), the allegation as to how he acquired his 2,000-acre lease was unnecessary. And as the court below stated (R. 56), the allegation of misrepresentation in connection therewith was refuted by the indictment itself, since the leases were attached as exhibits. The representation was but one of several misrepresentations petitioner was alleged to have made in selling oil leases to the Willauers and Dietrich. (See R. 2–3, 4.) It is well settled that a conviction may be predicated upon any fraud charged in the indictment. *Dilliard* v. *United States,* 101 F. (2d) 829, 833 (C. C. A. 2), certiorari denied, 306 U. S. 635; *Cowl* v. *United States*, 35 F. (2d) 794, 798 (C. C. A. 8); *Shreve* v. *United States,* 103 F. (2d) 796 (C. C. A. 9), certiorari denied, 308 U. S. 570; *Goldstein* v. *United States,* 63 F. (2d) 609 (C. C. A. 8). Therefore, the variance did not result in a lack of protection against double jeopardy or involve any

element of surprise prejudicial to petitioner's efforts to prepare his defense. *United States* v. *Ragen,* 314 U. S. 513, 526; *Bennett* v. *United States,* 227 U. S. 333, 338–339; *Hall* v. *United States,* 168 U. S. 632, 638–640; *Montgomery* v. *United States,* 162 U. S. 410, 411; cf. *Hoke* v. *United States,* 227 U. S. 308, 324.[2]

II

There clearly is no merit in petitioner's contention that the evidence was insufficient to support the verdicts of guilt returned against him under counts 4 and 5.[3]

1. Petitioner urges that the evidence does not show that he made any false representations to the Willauers or Dietrich in selling them oil leases—that his representations were mere "salesman's boosting" based upon articles published by the State of New Mexico and upon "opinions and

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[2] There is no contention by petitioner that the jury was permitted to base their verdict against him on the alleged misrepresentation in question. Indeed, there would be no basis for any such contention, since the charge to the jury is not included in the record. (See R. 43.)

[3] Since concurrent sentences of imprisonment were imposed upon petitioner under the two counts, his conviction may be sustained under either count. *Hirabayashi* v. *United States,* No. 870, last Term, decided June 21, 1943; *Gorin* v. *United States,* 312 U. S. 19, 33; *Whitfield* v. *Ohio,* 297 U. S. 431, 438; *Brooks* v. *United States,* 267 U. S. 432, 441; *Abrams* v. *United States,* 250 U. S. 616, 619; *Evans* v. *United States,* 153 U. S. 584, 595; *Claassen* v. *United States,* 142 U. S. 140, 146. However, the evidence supports conviction on both counts, as we shall show.

honest beliefs learned through newspapers, oil journals and other sources which he had every reason to believe were authentic" (Pet. 5, 10–12). There is nothing in the record to support this argument (but cf. R. 17–18). The oil leases were being sold by the State of New Mexico at 5 cents an acre, as compared with the $2.50 and $1.25 an acre petitioner charged the Willauers and Dietrich, respectively. Since petitioner was well informed regarding the oil business (*supra,* pp 7–8), he must have known there was no valid basis for his various representations (*supra,* pp. 4–6, 7–8), including his false assurances that the leases were in active territory and would result in large profits to their purchasers. In any event, as the court below stated (R. 57–58), "Undoubtedly, the representations made by defendant were highly exaggerated and unsupported by any geological facts or data. Whether they were fraudulently made as a part of a fraudulent scheme was a question for the jury; * * *."[4]

[4] Petitioner also asserts that the truthfulness of his representations to the Willauers and Dietrich that they could make large profits on the oil leases he had for sale was shown by the fact that shortly after the Willauers purchased a lease from him they had an opportunity to sell it for $1,000 (Pet. 10, 12). The offeror was a Mr. Lartern, who is now in a penitentiary (R. 26). However, petitioner represented that the large profits would result from an alleged increase in the *value* of the leases—a fact which was refuted by the proof. His representations were none the less false merely because some other person, either in good or bad faith, was willing to supplant the Willauers as the victim on the deal.

2. Contrary to petitioner's contention (Pet. 5–8, 12), the proof clearly supports the charges, contained in counts 4 and 5 of the indictment, that petitioner "caused" the mailing of oil-lease assignments to the Willauers and Dietrich by the Land Commissioner, Santa Fe, New Mexico, in furtherance of the alleged scheme to defraud.

There can be no question that both the count 4 and count 5 lease assignments were mailed at Santa Fe, New Mexico, by the Land Commissioner, as petitioner planned. The Willauers testified that they received the count 4 lease assignment through the mails and the envelope in which they received it showed that it had been mailed at Santa Fe, New Mexico, by the Commissioner of Public Lands, Santa Fe, New Mexico (*supra,* p. 9). Mr. Dietrich testified that he received the count 5 lease assignment through the mail and the letter of transmittal accompanying it showed that it had been sent by the Land Commissioner at Santa Fe, New Mexico (*supra,* pp. 9–10). The evidence of mailing at Santa Fe, New Mexico, by the Land Commissioner was therefore, in both instances, more than adequate. Cf. *Steiner* v. *United States,* 134 F. (2d) 931, 934 (C. C. A. 5), certiorari denied June 14, 1943, No. 1037, last term; *Gantz* v. *United States,* 127 F. (2d) 498, 502 (C. C. A. 8), certiorari denied, 317 U. S. 625; *McIntyre* v. *United States,* 49 F. (2d) 769 (C. C. A. 6).

That petitioner "caused" the alleged uses of the mails is clear. Mr. Willauer testified that petitioner sent "out" the count 4 lease assignment and Mr. Dietrich testified that he and petitioner deposited the count 5 lease assignment in a mail box, directed to the Land Commissioner, Santa Fe, New Mexico. Both the count 4 and count 5 mailings show on their face that the lease assignments had been forwarded to the Land Commissioner for filing with the Land Office, a filing fee of $5 having accompanied each assignment. (*Supra,* pp. 9, 10.) Since petitioner told the Willauers that they would receive their lease through the mail (*supra,* p. 9) he plainly contemplated that the Land Commissioner at Santa Fe, New Mexico, would return the lease assignments, or duplicate copies thereof, to the Willauers and Dietrich. Petitioner therefore "caused" the count 4 and count 5 mailings by the Land Commissioner at Santa Fe, New Mexico. *United States* v. *Kenofskey,* 243 U. S. 440, 442–443; *Hastings* v. *Hudspeth,* 126 F. (2d) 194, 196 (C. C. A. 10), certiorari denied, 316 U. S. 692; *Hart* v. *United States,* 112 F. (2d) 128, 131 (C. C. A. 5), certiorari denied, 311 U. S. 684; *United States* v. *Weisman,* 83 F. (2d) 470, 472–473 (C. C. A. 2), certiorari denied, 299 U. S. 560; *Silkworth* v. *United States,* 10 F. (2d) 711, 719 (C. C. A. 2), certiorari denied, 271 U. S. 664.

Under the circumstances, it is clear that petitioner's scheme to defraud contemplated receipt by his victims of their oil lease assignments. The formal completion of each assignment of a portion of his 2,000-acre lease kept him free from suspicion for the time being and enabled him to perpetrate his scheme on others. The mailing of the lease assignments by the Land Commissioner of the State of New Mexico was therefore an integral part of his scheme and did not occur, as he contends (Pet. 7), "after the entire transaction had been fully and completely consummated in the State of Pennsylvania." *United States* v. *Kenofskey,* 243 U. S. 440, 443; *Mitchell* v. *United States,* 126 F. (2d) 550, 554 (C. C. A. 10), certiorari denied, 316 U. S. 702; *Hastings* v. *Hudspeth,* 126 F. (2d) 194, 196 (C. C. A. 10), certiorari denied, 316 U. S. 692; *Creech* v. *Hudspeth,* 112 F. (2d) 603, 606 (C. C. A. 10); *Bogy* v. *United States,* 96 F. (2d) 734, 740 (C. C. A. 6), certiorari denied, 305 U. S. 608; *Corbett* v. *United States,* 89 F. (2d) 124, 125–126 (C. C. A. 8); *Lewis* v. *United States,* 38 F. (2d) 406, 416 (C. C. A. 9); *Brady* v. *United States,* 26 F. (2d) 400, 401 (C. C. A. 9), certiorari denied, 278 U. S. 621; *Newingham* v. *United States,* 4 F. (2d) 490, 491–492 (C. C. A. 3), certiorari denied, 268 U. S. 703.

CONCLUSION

The case was correctly decided below and involves no conflict of decisions or important ques-

tion of law. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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